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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 753

JOHN A. JOHNSON CONTRACTING CORPORATION
AND AMERICAN SURETY COMPANY OF NEW
YORK,

Petitioners,

vs.

THE UNITED STATES OF AMERICA FOR THE USE
AND BENEFIT OF WORTHINGTON PUMP & MACHINERY COR-
PORATION.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

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Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

The petition of John A. Johnson Contracting Corpora-
tion and American Surety Company of New York, respect-
fully shows to this Court:

This is a petition for a writ of certiorari to the United
States Circuit Court of Appeals for the Third Circuit.

On December 8th, 1943, an order was made by the said Circuit Court of Appeals affirming a judgment of the United States District Court for the Eastern District of New Jersey entered on May 6th, 1943, for the sum of \$4,393 plus costs in favor of the respondent and against the petitioners.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240a of the Judicial Code and this petition is filed under Supreme Court Rule 38, Paragraph 5 (b).

Statement of Matters Involved.

This is an action under the Miller Act on a payment bond (Act of Congress, Aug. 24, 1935, c. 642; 49 Stat. 793, 40 U. S. C. A. Section 270a) furnished by petitioner John A. Johnson Contracting Corporation hereinafter referred to as "petitioner", on which bond American Surety Company of New York was the surety.

Petitioner was the principal contractor under a contract made on January 9th, 1941, with the United States for the construction of temporary housing for a general hospital at Fort Dix, New Jersey (R. 65a). Such contract included in the work and material to be furnished by petitioner the following item: "Steam-heating distribution system for the sum of \$50,000" (R. 66a). The contract provided with respect to such item as follows:

"The price quoted under Item I is subject to the condition that the Government shall make available to the contractor a source of supply from which the contractor can obtain the boilers, stokers and controls, feed water heater, brooching steel, boiler house stack, indirect fan and induced draft fan called for in the contract at a total cost of \$50,000" (R. 66a).

On January 8th, 1941, petitioner entered into a subcontract with Harry Knecht Co. whereby the latter agreed to furnish the labor and material for the heating and ventilating system in the construction (R. 88a). Said subcontract also included the clause in the main contract above quoted (R. 89a).

Prior to the making of the contract between petitioner and the Government, the respondent submitted a bid to the United States to furnish a feed water heater for \$2,933 and a boiler feed pump for \$730 to be delivered to Fort Dix (R. 58a).

On December 31st, 1940, the Government accepted the Worthington bid for one feed water heater and two boiler feed pumps at a total cost of \$4,393. The Government wrote to respondent stating that respondent was authorized to proceed with the manufacture and shipment of the material and that a confirming purchase order would be issued by the construction contractor George A. Fuller Co. (R. 60a). Respondent acknowledged the Government acceptance and stated that in accordance therewith Worthington would invoice George A. Fuller Co. "as soon as they have sent us a formal order giving us the necessary billing address and other data." Respondent further stated that it was proceeding with the manufacture and that according to schedule delivery would be made on or before February 1st, 1941 (R. 64a).

On January 14th, 1941, Knecht, the subcontractor, sent an order called "Req. No. 2005" to respondent for the material. The order was as follows:

"Ship to: Us at Fort Dix, N. J. * * * This is in confirmation by us of order dated December 31st, 1940, by Clark E. Kirkendall, Captain A.M.C. Assistant, in acceptance of your quotation dated December 27, 1940, submitted by your Washington District Sales Office. Forward shipping notice to us" (R. 69a).

On January 31st, 1941, the respondent shipped the material by bill of lading addressed to George A. Fuller Co. in care of Harry Knecht Co. in care of Construction Quartermaster, Fort Dix. This bill of lading bears respondent's works number P-213226/227 (R. 74a).

On February 24th, 1941, respondent sent its invoice for the material to the subcontractor Knecht. Said invoice refers to Knecht order No. 2005 and respondent's works No. P-213226/7, and the invoice refers to the shipment to Fuller, care of Knecht, care of Construction Quartermaster (R. 79a).

The only charge made by the respondent on its books for the said material was to the subcontractor Knecht (R. 79a). Statements and collection letters were sent by respondent in due course to the subcontractor (R. 99a, 100a).

On January 21st, 1941 (a week after the order was sent by Knecht) petitioner sent a telegram to the respondent as follows:

"We are this day confirming by letter the order originally issued by Construction Quartermaster for feed water heater and two boiler feed pumps for 4393 dollars" (R. 70a).

Respondent did not reply to this telegram (R. 120a).

On January 27th, 1941, petitioner wrote to respondent as follows:

"This is our confirmation of our telegram and the order dated December 31st 1940, by Clark N. Kirkendall, Captain Q.M.C. Assistant in acceptance of your quotation dated December 26th, 1940.

Forward shipping notices to J. A. J. Construction Company, Inc. and Harry Knecht Company, subcontractor on heating. * * *

Kindly forward all copies of blueprints and any other data required to be submitted for approval in triplicate to the above field office" (R. 72a).

Respondent did not reply to this letter (R. 120a).


The Circuit Court of Appeals approved the finding of the Trial Court that the above letter was received by respondent too late to affect the shipment of the material (R. 130).

There were no communications or dealings between petitioner and respondent from January 27th, 1941, until July 31st, 1941, when petitioner wrote to the respondent requesting copies of invoices on materials delivered by respondent on the request of the subcontractor with an itemization of the credit given by respondent to the subcontractor (R. 120a, 81a). Respondent did not answer petitioner's letter immediately but instead wrote to the subcontractor stating that it had received such request from petitioner and that "this as you know covers feed water heaters furnished on *your* order to Fort Dix," and that before complying with petitioner's request respondent thought that the subcontractor ought to know about the situation so that the subcontractor could either pay the respondent thereby closing the matter or advise the respondent of any reason why the respondent should not furnish the information requested by the petitioner (R. 82a). The subcontractor answered the respondent stating that they had no objection to respondent's submitting a copy of its invoice to the petitioner (R. 83a).

On July 11th, respondent wrote to the petitioner enclosing a copy of its *invoice to the subcontractor* (R. 84a).

On July 28th, 1941, respondent again wrote to petitioner referring to its previous letter and "*to the balance owed us by Knecht*" and stating that "this was in connection with the *equipment furnished Knecht* for Fort Dix" (R. 87a).

Upon the foregoing facts the Circuit Court of Appeals found that there was a direct contractual relationship between petitioner and respondent so as to give respondent



a cause of action under the Miller Act on the payment bond furnished by the petitioner, without the necessity of serving the ninety day notice required by the Act, where it is sought to hold the principal contractor for material furnished at the request of a subcontractor (R. 131).

No such notice was given by the respondent (R. 128).

There is no dispute as to the facts in the case.

Questions Presented.

1. Where a contractor offers to purchase material from a material man, who prior thereto has received an order for such material from a subcontractor, and, before the contractor's offer is received by the material man, the latter ships the material to the subcontractor, and charges the subcontractor exclusively therefor, and fails to reply to the contractor's offer, does such shipment constitute an acceptance by the material man of the contractor's offer so as to create a contract or contractual relationship between the material man and contractor with respect to such material?

2. In the foregoing circumstances, does the material man have a direct contractual relationship with the contractor within the provisions of the Miller Act so as to give the material man a right of action against the contractor without the service of the notice required by Section 2 of the Act as a condition to liability on the payment bond?

Reasons Relied on for the Allowance of the Writ.

1. This case involves an important question of Federal Law which it is in the public interest to have decided and settled by this Court, as to the nature of the "contractual relationship, express or implied" referred to in Section 2(a) of the Miller Act.

2. This case involves a question of importance which it is in the public interest to have decided by this Court, as to whether, under the circumstances above indicated, a contractor is liable to a material man upon the payment bond furnished under the Miller Act, upon the theory of a "contractual relationship."

3. The Circuit Court of Appeals has decided an important question of general law as to contracts, insofar as the same applies to contractual relationships referred to in the Miller Act, in a way untenable, and in conflict with the weight of authority and with applicable decisions of this Court, in holding that an offer by a contractor to a material man for the purchase of material was accepted by the act of shipment of the material where

- a) the material man failed to reply to the offer or to comply with the terms thereof and
- b) the offer, as found by the District Court, and affirmed by the Circuit Court of Appeals, was received by the material man too late to affect the shipment, and
- c) the material was not shipped to the contractor but to a subcontractor in execution of the subcontractor's order as evidenced by the subcontractor's order, the material man's works number, the bill of lading and the invoice.

4. The decision of the Circuit Court of Appeals in construing the term "contractual relationship" as used in Section 2 (a) of the Miller Act contrary to established principles of law has nullified the protection given to contractors by the Act and has created a right of action not authorized by Congress and unfounded in law.

The petitioners therefore pray that a writ of certiorari may be allowed to review the judgment of said Circuit

Court of Appeals and that a writ may be issued to the Circuit Court of Appeals for the Third Circuit directing that all the proceedings in this case may be forwarded to this Court for review.

Dated, New York, February 18th, 1944.

Respectfully submitted,

JOHN A. JOHNSON CONTRACTING CORPORATION AND AMERICAN SURETY COMPANY OF NEW YORK,

By EMANUEL HARRIS,

Counsel for Petitioners.

